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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 JAMES PHILLIP MONAGHAN, III,

15 Defendant.

Case No. 2:19CR00206-WFN-1

United States' Sentencing
Memorandum and Response to
Defendant's Objections

16 The Plaintiff, the United States of America, by and through William D. Hyslop,
17 United States Attorney for the Eastern District of Washington, and Assistant United
18 States Attorney Richard R. Barker, submits the following sentencing memorandum.
19 For the reasons set forth below, and consistent with the parties' Federal Rule of
20 Criminal Procedure 11(c)(1)(C) plea agreement, the United States respectfully asks
21 the Court to sentence the Defendant, James Phillip Monaghan, III, to forty months'
22 imprisonment followed by ten years' supervised release.

23 **STATEMENT OF FACTS**

24 As set forth in the Presentence Investigation Report, ECF No. 44, and related
25 discovery in this case, on or about November 2, 2019, Defendant sexually assaulted
26 Minor 1, who was sixteen years old at the time, while Minor 1 was incapacitated and
27 unable to consent. Specifically, Defendant approached Minor 1 while she was asleep,
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1 removed her clothes and penetrated Minor 1's vagina with his penis. ECF No. 44 at
2 ¶¶ 8-16.

3 According to Defendant's own account of the assault, he was at a friend's trailer
4 in Nespelem, Washington on the evening of November 2, 2019. While there,
5 Defendant heard other voices from inside the trailer, including that of Minor 1.
6 Defendant then walked from a back room in the trailer into the kitchen to get a drink.
7 On the way, he passed by the middle room where he saw Minor 1, laying on the bed.
8 After grabbing the drink from the kitchen, Defendant entered the room where Minor
9 1 was asleep, began kissing her face, and started touching Minor 1's vagina under her
10 sweatpants. Minor 1 was unable to resist because she had been drinking that evening
11 and had fallen asleep. She was unconsciousness, but this did not deter the Defendant.
12 *See id.* at ¶ 10.

13 While Defendant was engaging in sexual contact with Minor 1, a friend of
14 Minor 1 walked into the room and saw Defendant touching Minor 1's vagina. At this
15 point, Defendant was told to leave the trailer, which he did. Although Defendant
16 exited the trailer, he hid next to one of the cars in the yard, as another car was pulling
17 up. Even though Defendant was kicked out of the trailer, he was not still was not
18 deterred. *See id.*

19 A few minutes after the car pulled up, Defendant went back inside through the
20 front door. Defendant then proceeded to remove Minor 1's pants without her consent.
21 He also removed all of his own clothing and began having vaginal intercourse with
22 Minor 1. Even though Minor 1 was asleep, Defendant was not deterred. He vaginally
23 raped his sleeping victim. *See id.* at ¶11.

24 Less than five minutes after Defendant vaginally penetrated his victim, Minor
25 1's friend again walked into the bedroom and saw Defendant having sexual
26 intercourse with Minor 1, who was asleep. The friend yelled, "You're raping her.
27 She's only 16 and you're 22, that's not right!" The friend again told Defendant to
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1 leave. Defendant, still undeterred, initially ignored the friend and continued having
2 unconsented vaginal intercourse with Minor 1. He continued for a short time, until
3 he ejaculated.

4 Finally, Defendant got dressed. At this point, the friend began throwing things
5 at Defendant. The friend also grabbed a baseball bat and chased Defendant out of the
6 trailer. Only then did Defendant leave, after sexually assaulting Minor 1 – affecting
7 her life forever. *See id.* at ¶11.

8 Defendant reported the offense the next day. If he had not done so, it is possible
9 that law enforcement may not have been able to effectively prosecute this case. Minor
10 1 did not have any memory of what happened and did not report the assault. When
11 law enforcement found her (i.e., after Defendant confessed to the crime), Minor 1
12 explained that she remembered only being intoxicated and feeling pain in her vaginal
13 area the next morning. Minor 1 could not remember any details of the rape, and there
14 was no forensic evidence – likely because Minor 1 showered the morning after the
15 assault. *Id.* at ¶13.

16 Notwithstanding that Minor 1 had no recollection of the offense, one of her
17 friends witnessed the assault and corroborated Defendant’s confession. This friend,
18 however, did not report the assault herself. Rather, she was identified as a result of
19 Defendant’s confession. Notably, the friend initially indicated that she did not want
20 to cooperate with law enforcement. *See id.* at ¶14.

21 **RESPONSE TO DEFENSE OBJECTIONS**

22 In response to the draft PSIR, Defendant lodged objections to two
23 enhancements identified in the PSIR: (1) application of the vulnerable victim
24 enhancement pursuant to USSG §3A1.1(b)(1); and (2) application of the repeat and
25 dangerous offender enhancement pursuant to USSG § 4B1.5(b)(1). The United
26 States’ position on these enhancements is set forth below:
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1 (1) *Vulnerable Victim Enhancement*

2 Under USSG §3A1.1(b)(1), a defendant is subject to a 2-level upward
3 adjustment when a Defendant knew, or should have known, that the victim of the
4 offense was a vulnerable victim. The comments to this guideline specify that this
5 enhancement applies to offenses involving an “unusual vulnerability,” but only if that
6 vulnerability is not already incorporated into the offense guideline:

7 Subsection (b) applies to offenses involving an unusually vulnerable
8 victim in which the defendant knows or should have known of the
9 victim’s unusual vulnerability. . . .

10 Do not apply subsection (b) if the factor that makes the person a
11 vulnerable victim is incorporated in the offense guideline. For example,
12 if the offense guideline provides an enhancement for the age of the
13 victim, this subsection would not be applied unless the victim was
unusually vulnerable for reasons unrelated to age.

14 USSG §3A1.1(b)(1), note 2.

15 Defendant’s position is that the offense guideline, USSG § 2A3.1(a)(2) takes
16 into account the victim’s vulnerability – i.e., the victim’s intoxication to the point of
17 unconsciousness. *See* ECF No. 45 at 2. Though the United States agrees that the
18 offense of conviction, 18 U.S.C. § 2242(2), takes into account the victim’s incapacity,
19 it is less clear that the offense guideline takes her intoxication into account.
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22 At least one Circuit court to address the vulnerable victim adjustment in the
23 context § 2242(2) prosecutions has applied the adjustment on facts similar to those at
24 issue here. *See United States v. Betone*, 636 F.3d 384, 388 (8th Cir. 2011) (upholding
25 a vulnerable victim enhancement on a § 2242(2) conviction where the victim “passed
26 out” from intoxication). Although counsel for the United States is unaware of any
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1 published decision in the Ninth Circuit applying the adjustment in a 2242(2) case, the
2 Ninth Circuit has applied the adjustment on facts similar to those at issue here, albeit
3 in an unpublished decision. *See United States v. Crudden*, 76 F.3d 389, 1996 WL
4 19195 (9th Cir. 1995). In *Crudden*, the Ninth Circuit explained:

6 The district court properly found that the defendant was aware of the
7 victim's unusual vulnerability because she was intoxicated and sleeping
8 at the time of the sexual abuse. The victim's mental and physical
9 condition prevented her from resisting the abuse. Therefore, the district
10 court was correct in applying the vulnerable victim adjustment to the
defendant's sentence.

11 *Id.* Notably, *Crudden* was decided in the context of a violation of 18 U.S.C. § 2243(a)
12 (statutory rape), and not §2242(2) (sexual abuse of a minor). This distinction could be
13 relevant to the Court's determination given that the offense guideline for prosecutions
14 under § 2243(a) differs from the offense guideline for prosecutions pursuant to §
15 2242(2). *Compare* USSG § 2A3.2 (Criminal Sexual Abuse of a Minor under the Age
16 of Sixteen Years (Statutory Rape)) *with* USSG § 2A3.1 (Criminal Sexual Abuse).

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20 (2) *Repeat and Dangerous Offender Adjustment*

21 USSG § 4B1.5 provides for a five-point upward adjustment where the
22 prohibited sexual conduct occurred on at least two separate occasions with the minor
23 victim. Specifically, note 4(B)(i) to USSG §4B1.5 instructs that the "pattern" required
24 for application of the enhancement is established "if on at least two separate
25 occasions, the defendant engaged in prohibited sexual conduct with a minor." The
26 word "separate" is not defined, which would be of no consequence, except in a unique
27 case such as this one.

1 This case involves one minor victim who was sexually assaulted by the
2 Defendant over the course of approximately one hour, if not less. The minor victim
3 has no recollection of the assault, including the number of times she was assaulted.
4 Defendant described touching the victim's vagina under her clothing before being told
5 to leave by Minor 1's friend. Shortly thereafter, Defendant returned and vaginally
6 penetrated the victim.

7 The commentary to U.S.S.G. § 4B1.5(b)(1) details an "occasion" on which the
8 defendant engaged in prohibited conduct can be considered for purposes of §
9 4B1.5(b)(1) "without regard to whether the occasion . . . occurred during the course
10 of the instant offense." *See* U.S.S.G. § 4B1.5 cmt. n. 4(B)(ii)(I). The Guideline does
11 suggest that each "occasion" need not be with a different minor. In fact, the April 30,
12 2003 amendment to the guideline changed "two minor victims" to read "a minor."
13 *See* U.S.S.G. § 4B1.5, comment. (n.4(B)(i)) (Nov. 2002).

14 The remaining issue is whether or not "two occasions" can be found from two
15 acts of penetration, even if they occur very close in time, within approximately one
16 hour or less, with the same victim. The government has not identified any controlling
17 authority directly on point; however, as set forth in Defendant's Sentencing
18 Memorandum, Judge Rice recently declined to apply the §4B1.5 enhancement on
19 somewhat similar facts, where a defendant sexually assaulted his victim two times
20 during a single day. *See United States v. Flett*, 2:18-CR-00231-TOR. In addition, the
21 government would note that the Guideline is intended to identify "repeat sex
22 offenders," who pose "a continuing danger to the public." *See* U.S.S.G. § 4B1.5 cmt.
23 Background.

24 **SENTENCING CALCULATIONS**

25 The government agrees with the United States Probation Office that
26 Defendant's criminal history category is I. *See* ECF No. 44 at ¶98. The United States
27 also agrees that while the Defendant may be sentenced up to lifetime of supervised
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1 release, his guideline for supervised release is five years. *Id.* In the event that the
2 Court agrees with U.S. Probation's calculations, Defendant's total offense level is 34,
3 resulting in an advisory guidelines range of 151 months – 188 months incarceration.
4 *See id.*

5 To the extent that the Court declines to apply a five-point upward adjustment
6 pursuant to USSG §4B1.5(b)(1) (Repeat and Dangerous Offender), Defendant's total
7 offense level would be 29, resulting in an advisory guidelines range of 87 – 108
8 months. Whatever his range, the Court may also take into account the measure of
9 Defendant's acceptance of responsibility and/or his diminished mental health
10 capacity, which currently are not factored into the advisory guideline range calculated
11 by U.S. Probation. *See* USSG §§ 5K2.13 and 5K2.16.

12 Based on these calculations and the totality of the record in this unique case,
13 the government stands by the plea agreement pursuant to Rule 11(c)(1)(C), and
14 recommends a sentence of 40 months imprisonment, followed by a 10 year period of
15 supervised release.

16 **SENTENCING FACTORS UNDER 18 U.S.C. § 3553(a)**

17 In determining the appropriate sentence, the Court should consider the factors
18 as set forth in 18 U.S.C. § 3553(a).

19 1. The nature and circumstances of the offense and the history and
20 characteristics of Defendant.

21 The circumstances of the offense involve Defendant's egregious sexual assault
22 of Minor 1, a sixteen-year-old child. Although Minor 1 does not have a specific
23 memory of the assault, she is well aware of what happened, and she will continue to
24 suffer from the effects of being sexually assaulted in her youth. Her community,
25 which is a small one, is also aware of the assault, given that members of the
26 community posted on Facebook about Defendant's conduct, albeit without referencing
27 Minor 1 by name.
28

1 Defendant's history and characteristics are concerning. While Defendant has no
2 prior criminal history, his mental health and traumatic brain injury appear to have
3 contributed to this offense – creating an impulsivity and failure to appreciate the
4 consequences of his actions – consequences not only for Defendant, but consequences
5 for Minor 1. In this regard, Defendant's mental health is a two-edged sword – it
6 arguably is a basis for lenity (consistent with Defendant's motion for a downward
7 departure pursuant to §5K2.13), but is also may give the Court significant pause given
8 the risk that Defendant's impulsivity may lead him to reoffend. A forty-month
9 sentence strikes the appropriate balance – taking into account the egregious nature of
10 the offense and the risk of recidivism, measured against the evidence that Defendant's
11 brain injury factored into the offense.

12 2. The need for the sentence imposed to reflect the seriousness of the offense,
13 promote respect for the law, and to provide just punishment

14 Both the government and the defense recognize the seriousness of Defendant's
15 crime. Indeed, if the Court were to consider the offense itself – i.e., without taking
16 into account Defendant's mental health history and the circumstances of his
17 confession – the United States would zealously seek a sentence within the applicable
18 guidelines range. This is so because Defendant had every opportunity to walk away.
19 He could have passed by Minor 1 when he saw her passed out, but did not. He could
20 have left after he realized she was asleep and intoxicated; he stayed. Defendant could
21 have left after the friend first saw Defendant raping the victim and told him to go, but
22 Defendant came back. These circumstances are extremely serious.

23 To his credit, however, Defendant, confessed of his crime the next day. While
24 his confession may not have been motivated *entirely* by guilt, remorse, or a desire to
25 do the right thing – i.e., because members of the community had posted about the
26 assault on Facebook – this case may never have been prosecuted but for Defendant's
27 confession. As set forth above, Defendant identified his victim and the material
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1 eyewitness. While he had no way of knowing it at the time, there would be no DNA
2 evidence linking Defendant to the crime.

3 Ultimately, Defendant must be sentenced for the offense conduct, which was
4 abhorrent in this case. That said, Defendant's acceptance of responsibility is
5 commendable and should be taken into account in crafting his sentence under 18
6 U.S.C. § 3553(a) and USSG §5K2.16 (extraordinary acceptance of responsibility).
7 Again, the United States may not have been able to meet its burden in this unique case
8 but for Defendant's repeated efforts to turn himself in and give a full confession.

9 3. The need for the sentence imposed to afford adequate deterrence to criminal
10 conduct and protect the public from further crimes of Defendant

11 The government asserts that a forty-month term of imprisonment is adequate
12 but not greater than necessary to deter further criminal misconduct, provided this
13 sentence is accompanied by ten years' supervised release. The sentence itself is
14 approximately half of the advisory guidelines range (assuming the Court does not
15 apply the adjustment under §4B1.5(b)(1)), but the period of supervised release is
16 double the advisory guideline range for supervised release. This extended period of
17 supervised release is necessary to ensure that Defendant's conduct and impulsivity is
18 carefully monitored following release from custody.

19 Ultimately, Defendant was undeterred by the fact that Minor 1 was sleeping
20 when he assaulted her. He was undeterred by the fact that she was only 16 years old.
21 Defendant was undeterred by the fact that Minor 1's friend told him to leave. A forty-
22 month sentence is necessary to deter further misconduct.

23 4. The need for the sentence imposed to provide Defendant with needed
24 educational or vocational training, medical care, or other correctional
25 treatment in the most effective manner

26 Defendant reported that he has graduated from high school in 2016. *See* ECF
27 No. 44 at ¶66. To the extent applicable, additional educational or vocational
28 opportunities may available while he is in the custody of the Federal Bureau of

1 Prisons. These would appear to be beneficial to him and provide increased
 2 opportunities upon his release. Substance abuse treatment should also be considered,
 3 given his history of using alcohol and other controlled substances. *See* ECF No. 44 at
 4 ¶¶ 60-65.

5 5. The need to avoid unwarranted sentence disparity among defendants with
 6 similar records who have been found guilty of similar conduct.

7 The best way to ensure consistent sentences for similarly-situated defendants
 8 across courtrooms, districts, and the country is for courts to apply the Guidelines in
 9 the same manner everywhere. *See United States v. Saeteurn*, 504 F.3d 1175, 1181
 10 (9th Cir. 2007); *United States v. Parker*, 462 F.3d 273, 277 (3d Cir. 2006); *United*
 11 *States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006). The Guidelines generally are
 12 the only normative way to accomplish that.

13 In this case, a sentence of forty months' imprisonment properly balances "the
 14 need to avoid unwarranted sentence disparities among defendants with similar records
 15 who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). This
 16 sentence takes into account the totality of Defendant's conduct, which was very
 17 serious as well as the unique history and circumstances of this case.

18 6. Basis for Upward Departure and/or Variance

19 The government respectfully submits, consistent with the parties' Rule
 20 11(c)(1)(C) plea agreement, that the 3553(a) factors relating to Defendant's offense
 21 and history are not adequately captured by the advisory guidelines sentence. As
 22 reflected by the initial guidelines calculations in the draft PSIR, it is a close call
 23 whether certain enhancements apply. *See* ECF No. 44. There may also be bases for a
 24 departure and/or variance pursuant to USSG §§ 5K2.13 and 5K2.16. The parties
 25 accounted for all of these considerations in their Rule 11(c)(1)(C) plea agreement,
 26 which balances the totality of Defendant's history and characteristics with the
 27 seriousness of the his crime against Minor 1.
 28

SENTENCING RECOMMENDATION

The Government reiterates its recommendation that the Court accept the Rule 11(c)(1)(C) plea agreement and sentence Defendant to forty months' imprisonment followed by ten years' supervised release. Such a sentence adequately captures the nature and severity of Defendant's offense conduct, as well as his criminal history, and relatively unique acceptance of responsibility.

Respectfully submitted this 17th day of February 2021.

William D. Hyslop
United States Attorney

s/ Richard R. Barker
Richard R. Barker
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Andrea George
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s/ Richard R. Barker
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